No. 93-289

In The

Supreme Court of the United States

October Term, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, *et al.*,

Petitioners,

v.

ARLEN SPECTER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the President has authority under the Defense Base Closure and Realignment Act of 1990 (the "Act") to order closure of domestic bases absent a valid list of closures submitted by the Base Closure Commission? (Answered in the negative by the court of appeals).

2. Whether the President's "accept all-or-nothing" limited involvement under the Act immunizes from judicial review base closure conclusions that were the product of a flawed and unfair administrative process? (Answered in the negative by the court of appeals).

3. Whether the strong presumption that acts of Congress are subject to judicial review applies where: (a) the express "purpose" of the Act is to provide a "fair process" for base closures; (b) there is no statutory language denying review; (c) the base closure process was flawed; and (d) construction of the Act to preclude judicial review would render it a complete nullity? (Answered in the affirmative by the court of appeals).

4. Whether federal courts have jurisdiction to review deliberate violations of the "fair process" expressly declared to be the "purpose" of the Act when there is no other way to ensure compliance with mandatory statutory safeguards? (Answered in the affirmative by the court of appeals).

5. Whether there is "final" agency action within the meaning of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), after: (a) the Base Closure Commission has submitted its all-or-nothing list to the President, who, within 15 days, accepts it in its entirety – as he must if there are

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED – Continued

to be *any* base closings for the year; (b) the House – after the *maximum* of two hours' debate – fails to pass a resolution of disapproval within 45 days; and (c) the Secretary of Defense begins to close and realign military bases? (Answered in the affirmative by the court of appeals).

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COUNTERSTATEMENT OF THE CASE

As Judge Stapleton of the Third Circuit observed at oral argument, the issues in this case go to the very core of the Republic. Petitioners' argument that there is no judicial review of their deliberate refusal to follow mandatory procedural safeguards of the Base Closure Act would permit the President unilaterally to nullify the will of Congress.[1]

Petitioners' egregious violations of the Act in rigging the decision to close the Philadelphia Naval Shipyard (the "Shipyard") constituted nothing less than outright *fraud*. By preventing the most knowledgeable Navy officers from testifying before the Base Closure Commission (the "Commission"), concealing critical Navy documents opposing closure of the Shipyard, holding closed meetings instead of public hearings[2]

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[1] The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. IV 1992) [reproduced at Pet. App. 98a-128a], expressly states that its "*purpose* . . . is to provide a *fair process*. . . . " § 2901 (emphasis added). On December 10, 1993, the Court of Appeals for the Second Circuit concurred with the Third Circuit's decision herein, holding justiciable allegations that the government "circumvented the base closure process by undertaking a [base] realignment . . . without submitting to the procedures specified" in the Act. *County of Seneca v. Cheney*, ___ F.3d ___, 1993 WL 504463, at pp. 1-2 & nn.2-3 (2d Cir., Dec. 10, 1993).

[2] Specifically, as alleged by Respondents, on December 19, 1990 and again on March 15, 1991, Admiral Heckman wrote memoranda to the Chief of Naval Operations, Admiral Kelso, urging the Navy not to close the Philadelphia Shipyard. Although Heckman was responsible for oversight of all Naval shipyards, the Navy refused to allow him to become a part of the base closure process. After his retirement from the Navy on May 1, 1991, Admiral Heckman was instructed by the Assistant Secretary of the Navy that he was *not* to testify before the Base Closure Commission at the public hearings on the Philadelphia Shipyard. In addition, a March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to Admiral Kelso recognized that closure of the Philadelphia Shipyard's large drydocks would create a shortfall for the Navy in the event of an emergency. Despite repeated requests by interested members of Congress for all relevant information, the Navy deliberately withheld and

and cynically predetermining the fate of the Shipyard[3] by compiling a "stealth list" of closures before the statutory process even began, Petitioners decimated the procedural heart of the Act and the express intent of Congress to provide a "fair process."[4] [Amended Complaint, ¶220, at App. 54-55]. Petitioners' argument that their illegal acts cannot be reviewed by a court – at any level, in any jurisdiction or under any circumstances – would eviscerate the vitality of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and two hundred years of subsequent constitutional jurisprudence.

Respondents do *not* challenge the substantive merits of the decision to close the Shipyard; they seek only to invoke the historic role of the federal judiciary to "check and balance" a runaway bureaucracy which boldly has disregarded express Congressional mandates critical to a "fair process." To expose the Navy's fraud has required the unprecedented and herculean bipartisan efforts of several members of Congress and the pro bono contribution of a major Philadelphia law firm, together with the extraordinary efforts of the Shipyard workers, their unions, the Governors of Pennsylvania, New Jersey and Delaware and the City of Philadelphia and its Mayor.

Having never anticipated that their fraud would be exposed, Petitioners now resort to the extreme argument that

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fraudulently concealed the Claman and Heckman memoranda from the General Accounting Office ("GAO"), the Commission, Congress and the public until after the close of the public hearings. [Amended Complaint, ¶¶96-100, 129, 132-133, 170, at App. 29-30, 34-35, 43].

[3] *See* Amended Complaint, ¶185, at App. 45.

[4] Obviously stung by the widespread publicity of the Navy's alleged misconduct in the *U.S.S. Iowa* disaster and the "Tailhook" debacle, Petitioners lamely argue that the violations here were merely "routine" and "garden variety." [Petitioners' Brief (hereinafter "Brief") at 14, 34]. However, deliberate violations which go to the very heart of a statute designed to ensure "fair process" in the closure of domestic military bases – decisions that affect the "livelihood and security of millions of Americans" – are hardly "routine" or "garden variety." 56 Fed. Reg. 6374 (Feb. 15, 1991).

even the most brazen and deliberate violations of the Act are beyond judicial scrutiny.[5] *Not once* in their 48-page brief do they even attempt to explain how this over-zealous interpretation of the Act can be reconciled with its Congressionally declared purpose: "to provide a fair process." Such an interpretation not only cynically ignores the preeminent role of the federal courts as the protector of constitutional rights, but would effectively *repeal* the Act, the guiding purpose of which is to restore procedural integrity to the base closure process.

A. Statutory Background

The Act's express purpose is to ensure a "fair process" and thus eliminate the political machinations and secret deliberations that had pervaded base closure decisions under prior statutes.[6] The Act vests an independent commission, whose members must be confirmed by the Senate, with the authority to formulate an all or nothing package of bases to be closed – thus depriving both the executive branch and Congress of the discretion to close bases unilaterally. The magnitude of the powers delegated to the Commission makes it critical that the mandatory procedures for evaluating bases and formulating the base closure package are rigorously enforced. Without judicial review, all of the carefully crafted procedural safeguards would be rendered meaningless rhetoric.

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[5] In this case, the District Court dismissed the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, this Court must accept all of its well-pleaded factual averments of a flawed base closure process as true and view them in the light most favorable to Respondents. Fed. R. Civ. P. 12(b)(6); *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

[6] There is much historical evidence suggesting that the executive branch has used base closings as a potent weapon to punish its political "enemies." *See* Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331 at n.13 (1991) (Nixon administration closed military bases in Massachusetts shortly after it was the only state to support McGovern in the 1972 presidential elections).

1. Congress first regulated the base closure process in 1966 by requiring the Department of Defense to provide it with 30 days' notice of any base closing. Pub. L. No. 89-188, § 611, 79 Stat. 793, 818 (1965). As conceded by Petitioners:

> During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic bases. Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. . . . To address those concerns, Congress in 1977 *enacted procedural restrictions on the Executive's authority* to close or realign the size of military bases.

[Brief at 2 (citations omitted) (emphasis added)].

2. Under the 1977 legislation, the Secretary of Defense was prohibited from closing a military base unless he had (1) notified the Armed Services Committees of both the House and Senate, (2) submitted an evaluation to Congress of the likely impact of the closure and (3) afforded Congress 60 days to reject the closure. *See* 10 U.S.C. § 2687(b) (Supp. IV 1980).

3. Intending to relinquish political responsibility for these sensitive base closure decisions, Congress and the President created an independent base closure commission under the 1988 Defense Base Closure and Realignment Act, Pub. L. No. 100-526. Congressional critics, however, charged that the 1988 commission's final closure decisions were made in secret, on the basis of flawed data, and that the GAO had no opportunity to review and verify the data.

4. On January 29, 1990, the Department of Defense unilaterally proposed to close the Shipyard and 35 other military installations in the United States. Because the Department's list of targeted bases "raised suspicions about the integrity of the base closure process," and to remedy the

lack of fair process inherent in the 1988 legislation, Congress enacted the 1990 Base Closure Act. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3110, 3257.

B. The Defense Base Closure And Realignment Act Of 1990

Petitioners *totally ignore* the indisputable fact that the express "purpose" of the Act is "to provide a *fair process* that will result in the timely closure and realignment of military installations." 10 U.S.C. § 2901(b) (emphasis supplied).[7] To ensure fairness, the Act creates an *independent* Base Closure Commission to prepare a package of base closures which must be accepted or rejected *in toto* by the President and the Congress.[8] The Commission is not a perfunctory agency. Its members are endowed with the only authority to determine particular bases for closure. § 2903(d)(2)(b).[9] However, in exchange for this autonomy in determining bases for closure, Congress mandated a number of non-discretionary procedural safeguards – agreed to by the President when he signed the Act into law – for the Commission's deliberations and conclusions that were absent from predecessor base closure statutes. As Petitioners *concede*:

- The Secretary of Defense ***must*** prepare and publish, subject to congressional disapproval, a six

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[7] *Not one word* of Petitioners' Brief reflects any recognition of the express purpose of the Act. Astonishingly, it is simply *ignored*.

[8] A provision of the Act not invoked in this case permits the President to send the list back to the Commission once. The Commission may or may not then revise the list, but, in any event, when resubmitted to the President, it must be accepted or rejected *in toto*. § 2903(e). If rejected, there will be *no* base closings for that year. § 2903.

[9] The Commission's members are appointed by the President only after consultation with Congress and confirmation by the Senate. § 2902(c).

year "force structure" plan assessing potential national security threats and the military force structure necessary to meet such threats. § 2903(a)(1)-(2), [Brief at 5];

- The Secretary ***must*** prepare and publish, subject to congressional disapproval, specific criteria for use in identifying military installations to be closed or realigned. Among the eight closure criteria promulgated by the Secretary is the "economic impact on communities" of a closure or realignment. 56 Fed. Reg. 6374 (Feb. 15, 1991), [Brief at 5];

- The Secretary's closure recommendations ***must*** be based upon the published force structure plan, the published base closure criteria and the relevant "data base." § 2903(c), [Brief at 5];

- The Secretary ***must*** transmit to both the Commission and the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments," so that the GAO can assist the Commission in its deliberations. § 2903(c)(4), [Brief at 39 & n.26];

- The Commission ***must*** conduct public hearings on the Secretary's recommendations and must open all its deliberations to the public, except where classified information is discussed. § 2902(e)(2)(A), [Brief at 5-6].

The President has a mere 15 days to accept or reject the list submitted by the Commission in its entirety. If approved, the unchangeable list next goes to Congress, which is given a maximum of only 45 days to disapprove the package as a whole and but 2 hours to debate the matter. § 2908(d)(2).

It is unthinkable that Congress – having gone to such great lengths to create an act for the very "purpose" of

ensuring a "fair process" – intended to strip the federal judiciary of its historic role to check the bureaucracy's homework. The facts of the case now before this Court – where a fraudulent process will survive unchecked if Petitioners have their way – powerfully illustrate that such a construction of the Act would render it a complete nullity.

C. The Proceedings Below

1. On April 15, 1991, Secretary of Defense Richard Cheney submitted an extensive list of military installations to be closed or realigned to the 1991 Base Closure Commission. The Shipyard was one of the installations targeted for closure. The decision to close the Shipyard was the product of an admittedly *flawed and unfair* process. Contrary to the Act's express mandates, the Secretary, *inter alia*, concealed key Navy documents recommending that the Shipyard remain open, prevented the most knowledgeable commanding Naval officer from testifying before the Commission and failed to provide the GAO and the Commission with adequate documentation to support his recommendation for closure. In fact, the decision to close the Shipyard had been predetermined without any procedural safeguards and recorded on a "stealth list" formulated in secret before the 1990 Act was even passed.[10] *See* note 2, *supra*.

The GAO concluded that, because of lack of documentation, *it could not perform its statutory duty* to review the Navy's decision.[11] In an illegal attempt to "try to resolve missing gaps in the information provided," the Commission held closed meetings with the Navy after the public hearings

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[10] The Act expressly forbids the Secretary of Defense from considering any military installation on the basis of prior Department of Defense base closure considerations or recommendations. § 2903(c)(3).

[11] Indeed, the GAO Report concluded that the Navy's recommendations and process were *entirely* inadequate in violation of numerous provisions of the Act. [Amended Complaint, ¶¶139, 142-146, 151-152, at App. 36-39].

were completed during which it received documentation necessary to rationalize its predetermined conclusions. [Amended Complaint, ¶¶159-164, at App. 40-41]. On June 23, 1991, upon completion of its badly flawed process, the Commission submitted to the President an "indivisible package" of base closures that included the Shipyard.

3. Respondents filed their Complaint on July 9, 1991, and an Amended Complaint on July 19, 1991, seeking to enjoin the Secretary from closing the Shipyard because a fundamentally flawed process had tainted the results. Respondents alleged – and those allegations must be deemed true for purposes of this appeal, *see* note 5 *supra* – that the Secretary and the Commission had deliberately failed to comply with non-discretionary procedural mandates of the Act. On July 15, 1991, the President nevertheless approved the Commission's entire package of closures, and on July 30, 1991 (less than 15 days later), the House of Representatives, after only 2 hours of debate, rejected a resolution disapproving the Commission's recommendations. On August 30, 1991, the Secretary began closing targeted military installations.

4. On November 1, 1991, following expedited discovery and a hearing on Respondents' motion for preliminary injunctive relief, the District Court erroneously dismissed the Amended Complaint on the ground that the legislative history of the Act reflected a congressional intent to abrogate all judicial review. *Specter v. Garrett*, 777 F. Supp. 1226, 1227-28 (E.D. Pa. 1991).[12]

5. On April 17, 1992, the Court of Appeals reversed, holding that there was "no clear evidence of congressional intent to preclude all judicial review." *Specter v. Garrett*, 971 F.2d 936, 949 (3d Cir. 1992). The court concluded that the judicial branch has the power and duty to review violations of

[12] Alternatively, the District Court found Respondents' claims nonjusticiable under the "political question" doctrine. *Specter v. Garrett*, 777 F. Supp. at 1227-28. That ruling, however, was reversed by the Third Circuit and as Petitioners' "Statement of Questions Presented" makes clear, is not an issue before this Court. [Brief at I].

the Act's mandatory non-discretionary procedures. 971 F.2d at 936.

6. On November 9, 1992, this Court granted *certiorari* and remanded the case to the Third Circuit for consideration of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, the Third Circuit found no reason to change its prior holdings.[13]

7. On August 28, 1993, Petitioners again sought *certiorari*, which was granted on October 18, 1993. For the following reasons, it is respectfully submitted that the decisions of the Court of Appeals for the Third Circuit should be affirmed.

SUMMARY OF THE ARGUMENT

Confronting "suspicions about the integrity of the base closure selection process," H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), Congress adopted the 1990 Base Closure Act as the "exclusive means for the closure of domestic bases." *Specter v. Garrett*, 971 F.2d at 947 (quoting § 2909(a)). The Act's express "purpose" is to ensure a fair process in the closure of domestic military bases. Petitioners argue that even a fundamentally flawed process is immune from judicial review. This strained interpretation ignores two centuries of precedent holding that, to protect our democracy, congressional limitations on delegated authority will be enforced by an independent federal judiciary. Nothing in

[13] Petitioners suggest that the Third Circuit, on remand, based its conclusion of judicial review on constitutional grounds not raised by the parties. However, Respondents did argue the principle that drives the constitutional issue here: the executive branch is not above the law. Even if Petitioners were correct, however, it is a fundamental principle that an appellate court may affirm a decision on any ground supported by the record, even on a ground rejected by a lower court. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered" below) (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

Franklin abrogates this historic role of the federal judiciary. Petitioners seek to obscure the core issues in this case by presenting hypertechnical, abstruse arguments which, if accepted, would eviscerate the meaning and purpose of the Act and create a most dangerous precedent.

I.A. The Third Circuit's opinions are consistent with *Franklin*. The Third Circuit concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates have exceeded powers under applicable statutes or the Constitution.

B. *Franklin* does not alter the federal judiciary's historic role of ensuring that presidential conduct does not exceed statutory or constitutional authority. In fact, *Franklin* (the latest in a line of decisions stretching back nearly 200 years) confirms that presidential action may be reviewed even if review is not permitted under the Administrative Procedure Act ("APA"). Consistent with *Franklin*, the Third Circuit's initial opinion held that presidential conduct is subject to judicial review, independently of the APA, where it exceeds the scope of statutory or constitutional authority. On remand, the Third Circuit confirmed, holding that the President's approval of a procedurally flawed closure package exceeded his authority and thus raised a judicially reviewable separation of powers issue. Although Petitioners argue that the Third Circuit erred in relying on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court in *Franklin* itself cited *Youngstown* for the proposition that non-APA review of presidential acts is permissible where the President has exceeded his authority.

C. The unique facts which led this Court in *Franklin* to hold that the agency action was not final do *not* apply to the independent Base Closure Commission's report to the President, which must be accepted or rejected *in its entirety* within 15 days of receipt. In contrast to *Franklin*, where the President had complete discretion to reject or ignore the recommendations of the Secretary of Commerce and substitute his own data, the President *cannot* unilaterally amend or modify the base closure package, *nor* is he authorized to add or eliminate individual bases to the closure list. Indeed, the

President has neither the time nor the means to verify that the base closure package has been lawfully prepared pursuant to the "fair process" mandated by Congress.

Instead, the President must rely on the Commission's process in preparing the list. As the Third Circuit emphasized:

> Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

971 F.2d at 947 (emphasis added). The Commission's actions are thus "final" for purposes of judicial review.

II. The Third Circuit correctly held that there was *not sufficient evidence to rebut the strong presumption that Congress intended judicial review of violations of the Act's procedural mandates.* While conceding that there is a strong presumption in favor of judicial review and that the Act does not expressly prohibit such review, Petitioners nonetheless suggest that the Act's structure, purpose and legislative history reflect "clear and convincing" evidence of a congressional intent to deny all judicial review, even review of constitutional and statutory violations. However, Petitioners' construction would render the Act a nullity since its mandate of a "fair process" could be flouted, as it deliberately was here, by the executive branch and its bureaucracy at will. If Congress had intended that result, it simply could have permitted the executive branch to close bases for any reason at all.

A. Petitioners argue that the base closure process under the Act is immune from judicial review because it implicates matters of "national security" or "sensitive questions of military policy." However, base closures that deal with matters of national security are *expressly exempt* from the Act. 10 U.S.C. § 2909(c)(2).

B. Petitioners' Brief totally *ignores* the Act's express "purpose," *i.e.*, to ensure a "fair process," and inexplicably

fails to contain even a *single reference* to this essential consideration. Their analysis, by definition, is thus as fatally flawed as the process it seeks to defend.[14]

C. Petitioners point to one ambiguous excerpt in the Act's Conference Report to support their position on judicial review. Their strained contention fails in light of the structure of the Act, its purpose and its legislative history, all of which unmistakably cry out for the federal courts to exercise their historic powers of review.

D. The text of the Act itself confirms the *availability* of judicial review. The Act's express limitation of review under the National Environmental Policy Act ("NEPA") demonstrates that Congress knew how to limit judicial involvement when it so intended. That it chose to do so only with respect to NEPA, *not* with respect to review of procedural violations of the Act, is compelling evidence that Congress intended judicial review.

III. If the Act were read to eliminate all judicial review, two constitutional problems would arise. First, Congress cannot delegate authority to close military bases to an independent, non-elected Commission unless judicial review is available to determine whether the Commission has acted within the scope of its authority. Without judicial review, the Act would represent an unconstitutional delegation of legislative authority. Second, abrogation of judicial review of claims arising under the Constitution is itself constitutionally suspect and intrudes upon the federal judiciary's role to protect the separation of powers. To avoid needlessly addressing these constitutional issues, this Court should construe the Act to provide for judicial review of Respondents' claims.

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[14] Petitioners erroneously suggest that a flawed process can be overcome through "substantial" presidential and congressional oversight. As discussed *infra* at pp. 29-32, 43-44, the President has a mere 15 days to accept or reject the Commission's indivisible list of closures and Congress has only 45 days (with a total of 2 hours of debate) to pass a joint resolution rejecting the list. §§ 2903(e), 2904(b), 2908(c)-(d).

ARGUMENT

I. *FRANKLIN v. MASSACHUSETTS* SUPPORTS JUDICIAL REVIEW.

A. The Third Circuit's Opinions Are Consistent With *Franklin*.

Under the "automatic reapportionment statute" at issue in *Franklin*, the Secretary of Commerce was required to report census data to the President, who then applied a formula specified in the statute to determine the number of representatives allocated to each state. 112 S.Ct. at 2771. No particular procedural safeguards were mandated for the Secretary to follow. The President subsequently transmitted the results to Congress for implementation of the decennial reapportionment. The Secretary included in her census report federal employees living abroad (primarily military personnel) as residents of their "designated" home state. Plaintiffs sought review of this report under both the APA and the constitution.[15] *Id.* at 2773.

The district court found for plaintiffs on their APA challenge and ordered the President to recalculate congressional apportionment using census figures that did not include overseas federal employees. *Id.* Reversing the district court in a direct appeal, this Court held that the Secretary's report to the President constituted mere "tentative recommendations" and was not "final" agency action subject to judicial review because the automatic reapportionment statute did not require

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[15] The Secretary's decision to include the disputed federal employees in the 1990 census caused one House seat to be shifted from Massachusetts to the State of Washington 112 S.Ct. at 2770. Plaintiffs argued that the Secretary's action was arbitrary and capricious because there was substantial evidence that when military personnel designated their home state upon induction, they disproportionately selected a state with low income tax rates rather than their actual home state. *Id.* at 2771-73. Plaintiffs' constitutional challenge was based on their argument that the inclusion of federal employees living abroad violated the requirement that the census be conducted through an "actual enumeration" of persons living within a state. *Id.* at 2773.

the President to accept or even consider the Secretary's census figures. He could act totally independently from the Secretary or instruct the Secretary to reform the census. *Id.* at 2774.

Franklin further held that the President's actions were not reviewable under the APA because the President is not an "agency" within the meaning of that statute.[16] *Id.* at 2775. This Court expressly confirmed, however, that regardless of his status under the APA, "the President's actions may still be reviewed for constitutionality." *Id.* at 2776.

Although the Third Circuit's initial opinion in this case was rendered before *Franklin*, it is consistent. The Third Circuit concluded that judicial review under the Act is appropriate after the Base Closure Commission's list has been transmitted by the President to Congress and not rejected within 45 days. In addition, the Third Circuit, anticipating *Franklin*'s ruling that the President is not an "agency" under the APA, assumed for the purpose of its analysis that presidential conduct is *not* subject to judicial review under the APA's "arbitrary and capricious" standard.

The Third Circuit nonetheless concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates exceeded their powers under applicable statutes or the Constitution. The Third Circuit's opinion on remand, citing *Youngstown* – a case also relied on by *Franklin* – confirmed this basic precept of American jurisprudence. *See Specter v. Garrett*, 995 F.2d at 409. Thus, both *Franklin* and the Third Circuit's opinions

[16] The Court explained: "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the APA's textual silence did not provide an adequate basis to assume that Congress intended that the President's performance of "statutory duties be reviewed for abuse of discretion." 112 S. Ct. at 2775.

hold that where the President exceeds the scope of his statutory or constitutional powers, judicial review *must* be available to preserve the tripartite structure of our constitutional form of government.[17]

B. *Franklin* Confirms The Historic Power Of The Federal Judiciary To Restrain Executive Branch Conduct Violating The Constitutionally Mandated Separation Of Powers.

Nothing in *Franklin* even purports to disturb the federal judiciary's historic role of ensuring that presidential conduct does not exceed constitutional or statutory boundaries. On the contrary, *Franklin's* narrow holding that the President is not an agency under the APA has *no* effect on the fundamental principles governing judicial review that originated nearly 150 years before the APA's enactment. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (President's instructions that went beyond scope of congressional authorization could not "legalize an act which without those instructions would have been a plain trespass"). *See also Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"); *A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) ("The purpose of [the APA] was to extend judicial review that had previously existed and to proscribe procedure and scope of judicial review. Such judicial review as existed outside of the Act remained unfettered by it.").[18]

[17] Petitioners cite no authority for their argument that there is a meaningful distinction between presidential actions taken in excess of statutory authority and actions taken contrary to a constitutional provision. No case has ever suggested that the federal judiciary does not possess the constitutional power to review under the separation of powers doctrine the actions of the President for statutory or constitutional compliance.

[18] Petitioners rely on *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as support for the total abrogation of judicial review under the Act.

Rather than limiting *Youngstown* (or any other source of judicial review of presidential conduct other than under the APA's "arbitrary and capricious" standard), *Franklin relied on Youngstown* for the proposition that the President's conduct is subject to review for constitutionality. The Third Circuit also properly relied on *Youngstown* to conclude that the President's conduct is subject to constitutional review where he exceeds the scope of authority granted by Congress under the Base Closure Act. *Franklin* is thus not only consistent with, but affirmatively supports, the decision below.

1. Executive Branch Conduct That Violates The Scope Of Authority Delegated By Congress Or The Constitution Will Be Enjoined To Preserve The Constitution's Separation Of Powers.

The Constitution divides governmental power into three branches: the legislative, the executive and the judicial. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). That division of powers and functions "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that was drafted in Philadelphia in the Summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The Constitution separates the branches of government "not to promote efficiency, but to preclude the exercise

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Significantly, just three weeks ago, the Second Circuit in *County of Seneca*, ___ F.3d ___, 1993 WL 504463 (2d Cir., Dec. 10, 1993), agreed with the Third Circuit that violations of the Act's fair process mandate are judicially reviewable. *See* note 1, *supra*. To the extent *Cohen* even applies, it is plainly wrong. *Cohen* affirmed summary judgment for the government on the ground that the Commission's transmittal of the base closure package to the President was not final agency action within the meaning of *Franklin*. For the reasons stated herein, that ruling was erroneous. *See* discussion *infra* at pp. 29-32. Moreover, *Cohen* did not even purport to address the federal courts' historic powers (outside of the APA) to review presidential conduct which exceeds statutory or constitutional authority. Without a valid package, the President simply lacks the authority to act. *See* discussion *infra* at pp. 20-27.

of arbitrary power" and to "save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect that vital safeguard of liberty, the *Youngstown* Court enjoined enforcement of a presidential order that exceeded both the scope of authority granted by Congress and that granted under Article II of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). *See also* Hamilton, *The Federalist No.* 78 ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

Franklin's reliance on *Youngstown* was well placed. In April, 1952, at the height of the Korean conflict, the steelworkers' unions gave notice of a nationwide strike. To ensure continued production of essential war materials, President Truman ordered the Secretary of Commerce to seize and operate the steel mills. Justice Black's "Opinion of the Court" first recognized that the President's authority was limited by the Constitution's separation of powers:

> The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

343 U.S. at 587.

Finding the President without either constitutional or statutory authority to order the seizure of private industries – regardless of the asserted military crisis – the Court declared the President's order illegal and affirmed the injunction against the Secretary entered below. *See* Currie, *The Constitution in the Supreme Court: 1888-1986*, p. 369 (Chicago 1990) ("*Youngstown* . . . stands as an eloquent reminder that the President must obey the law and that in general he may act only on the basis of statute.").

The pole-star of *Youngstown* – that the executive branch is bound by express limitations on authority granted by Congress and the Constitution – is almost as old as the Republic itself. In *Little v. Barreme*, an action for damages was brought against the commander of an American warship for his capture of a Dutch commercial vessel on the open seas. The commander defended his seizure on the grounds that: 1) the President had instructed naval commanders to seize American vessels bound to or from French ports; and 2) there was probable cause to believe the ship of American origin. In fact, the *Flying Fish* was of Dutch, not American origin. More critically, however, the statute under which the President issued the instructions only authorized the seizure of American vessels sailing *to* French ports, and the *Flying Fish* had been seized on its way *from* a French port.

While noting that it was "by no means clear" that the President lacked constitutional authority to order the seizure as Commander-in-Chief, Justice Marshall nonetheless emphasized that Congress *had* prescribed limited grounds for seizure. 2 Cranch at 177-78. Justice Marshall thus concluded that, as the President's instructions had gone beyond the scope of the limited congressional authorization, they could not "legalize an act which without those instructions would have been a plain trespass." *Id.* at 178. *See also Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) ("[I]t would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.").

Youngstown and *Little* stand for a principle at the very core of our constitutional government – that where the President or subordinate executive officers act beyond the scope of their legal authority, judicial relief must be available to protect the separation of powers. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) ("When judicial action is needed to serve broad public interests . . . as when the Court acts, not in derogation of separation of powers, but to maintain their

proper balance . . . that exercise of jurisdiction has been held warranted"); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution. . . . "); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress"). Nothing in *Franklin* abrogates that critical role of the federal judiciary. And nothing in the Third Circuit's opinions below is inconsistent with *Franklin*.[19]

2. Judicial Review Is Available To Secure Executive Branch Compliance With The Mandatory Procedural Requirements Of The 1990 Base Closure Act.

Petitioners concede that their *only* authority to close domestic military bases is that which they obtained from Congress under the Base Closure Act: "Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure." [Brief at 33]. It is likewise undisputed for the purposes of this appeal that they deliberately ignored congressionally mandated procedural safeguards in determining to close the Shipyard. Thus, Petitioners, having acted without either statutory

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[19] Even Justice Scalia's separate opinion in *Franklin*, although suggesting that separation of powers concerns should prevent a federal court from entering injunctive relief against the President, nonetheless distinguished between an injunction against the President directly and one against a subordinate executive officer attempting to carry out an illegal presidential directive. Justice Scalia's reluctance to allow the former did not:

> in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.

112 S. Ct. at 2790 (emphasis in original) (citing *Youngstown*). In the present case, Respondents seek to enjoin the Secretary of Defense, not the President, from closing the Shipyard.

or constitutional authority, cannot close the Shipyard. *Youngstown* and *Franklin* both support the Third Circuit's holding that judicial review is available to enjoin Petitioners from exceeding the scope of their legal authority.

(a) The President Was Without Statutory Authority To Approve A Base Closure Package Prepared In Violation Of The Congressional Mandate.

Petitioners first suggest that *Youngstown* can be distinguished because it involved an assertion of presidential authority that Congress had specifically rejected when it refused to amend the Taft-Hartley Act to permit executive branch seizure of private industry. In contrast, Petitioners argue, the Base Closure Act authorizes the President to accept or reject the Commission's indivisible base closure package for any reason at all. Thus, according to Petitioners, the President's limited involvement under the Act places the entire base closure process beyond judicial review, even though the Secretary and the Commission deliberately violated congressional mandates in performing their respective statutory duties.[20]

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[20] In fact, *Franklin* itself suggests that no amount of statutory discretion can ever insulate a President from the illegal conduct of subordinate executive officers. In holding the President's conduct subject to constitutional review regardless of APA status, and despite the lack of finality of the Secretary's tentative census report, the *Franklin* Court nonetheless examined whether "the Secretary's allocation of overseas federal employees to the States violated the command of Article I, § 2, cl. 3, that the number of Representatives per State be determined by an 'actual Enumeration' of 'their respective Numbers.' " 112 S. Ct. at 2777 (emphasis added). Nothing in *Franklin* suggested that federal overseas employees were included in the 1990 census at the President's direction or that the President was required by statute to approve the Secretary's methods. Yet nothing in *Franklin* suggested that the majority had changed its mind and decided to review the Secretary's conduct, regardless of finality. Thus, *Franklin* reviewed only the ***President's*** conduct in deciding whether the ***Secretary's*** census method violated the Constitution.

Petitioners radically misconstrue both the nature of the statutory scheme at issue here and the nature of the President's limited involvement within that scheme. As the Third Circuit recognized, the President's *only* authority under the Act is to approve or reject a base closure package which was prepared in accordance with the statutory procedures:

> [W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.
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> *[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process.*

995 F.2d at 407, 409 (footnote omitted) (emphasis partly in original).

The President has no greater statutory authority to approve a materially flawed base closure package than he has to submit to Congress a closure package of his own independent creation. Where the Act's non-discretionary statutory safeguards have been ignored, the President receives nothing from the Commission upon which he has statutory authority to act. Hence, the President's "approval" of the 1991 base closure package was "without authority of law, illegal and void." *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to

provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void").

As with the Base Closure Act, the statutory scheme in *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349 (D.C. Cir. 1965), required presidential approval of agency determinations. Specifically, the statute authorized the President to approve or reject decisions of the Civil Aeronautics Board (the "Board") affecting overseas air carriers. Seventeen years earlier, in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), this Court had declared that, in light of the President's broad constitutional authority over foreign affairs, his statutory approval of a Board determination was not subject to judicial review on the ground that the Board order lacked "substantial evidence." *Id.* at 111-12.[21]

Chief Justice (then Judge) Burger distinguished *Waterman* as involving only whether the Board determination was supported by "substantial evidence." 348 F.2d at 353. In contrast, plaintiffs in *American Airlines* alleged that the Board acted beyond the scope of statutory authority in authorizing "split charter" arrangements. *Id.* at 351. In finding that *Waterman* did not preclude review of the President's approval

[21] Although the *Waterman* majority did not specify the nature of the plaintiffs' challenge to the Board order at issue, the dissent noted that plaintiffs had alleged the Board lacked "substantial evidence" to support its findings. 333 U.S. at 117. In any event, the majority did note that the Board proceedings were not being "challenged as to regularity." *Id.* at 105. Based on that language, subsequent courts have distinguished *Waterman* as *not* involving a claim that the Board exceeded the scope of its statutory authority. *See Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394, 396 (D.C. Cir. 1963) ("[*Waterman*] neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board"); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (Burger, J.) (*Waterman* has no relevance where "the President purports to approve a recommendation which the Board was powerless to make").

of a Board determination itself violating statutory authority, Judge Burger held:

> The deference *Waterman* accords to presidential discretion in matters of national defense and foreign policy as they bear on overseas air carriers has no relevancy where, as here alleged, the President purports to approve a recommendation which the Board was powerless to make; *if indeed the Board has no power, then as a legal reality there was nothing before the President.*

Id. at 353 (emphasis added). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) ("if the President cannot act without a Board recommendation, it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive himself was acting within his statutory authority").

From the outset, Respondents have alleged that the Secretary and the Commission acted beyond the scope of congressional authority in preparing the 1991 base closure package. And as the Third Circuit acknowledged, the President's own statutory authority is "expressly confined by Congress to action based on a particular type of process." Because that process was materially flawed, the President had no lawful base closure package upon which he could act. The President's purported approval of the defective package, and his transmission of that defective package to Congress, were thus beyond the scope of the statutory authority delegated to him by Congress. Both *Youngstown* and *Franklin* establish that, to protect the constitutionally mandated separation of powers, the President's involvement in the base closure process must be subject to judicial review.

(b) Where The Executive Branch Exceeds The Scope Of Authority Delegated By Congress, It Necessarily Breaches The Constitutionally Mandated Separation Of Powers.

While Petitioners concede that *Franklin* permitted constitutional review of the President's conduct, they contend that *Franklin's* holding is not relevant here because the President violated only a statute, not the Constitution. In contrast, Petitioners suggest, *Franklin* reviewed whether the Secretary's census method violated a specific provision of the Constitution. *Without citing any authority*, Petitioners assert that the distinction between presidential conduct that violates the constitutionally mandated separation of powers, and presidential conduct that violates specific constitutional provisions, makes a difference with respect to the availability of judicial review under the Base Closure Act. That argument must be flatly rejected.

In holding the President's conduct subject to constitutional review, *Franklin* relied squarely on *Youngstown*. Yet *Youngstown* itself relied on the separation of powers precepts that are not traceable to any specific constitutional provision, but instead are "woven into the document" as a whole. *See Buckley*, 424 U.S. at 123. *Youngstown* examined not just whether the executive branch violated a single constitutional provision, but whether the President's conduct had breached the very fabric of our constitutional order. The President's violation of the Base Closure Act raises constitutional concerns no less compelling.

Thus, the Third Circuit properly relied on both *Franklin* and *Youngstown* in holding that judicial review is available to determine whether the President exceeded the scope of his statutory authority in approving the 1991 base closure package. As recognized below:

> We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take

> and that judicial review is available to determine whether such authority exists. *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. Indeed, we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*.

995 F.2d at 409 (citations and footnote omitted).

Whether judicial review in this case is labeled "constitutional review," or a "form" of constitutional review, is not important. Regardless of label, judicial review of the President's compliance with the law is an absolute necessity if the separation of powers is to serve the purpose for which it was designed. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of his authority or under an authority not validly conferred").

(c) For The Purpose Of Determining The Scope Of Judicial Review, No Distinction Can Be Made Between Constitutional Claims Involving Separation Of Powers Issues And Claims Involving Constitutionally Protected Property Interests.

Finally, Petitioners attempt to distinguish *Youngstown* as involving constitutionally protected private property rights. In contrast, Petitioners suggest, the "constitutional" issue raised here involves the separation of powers. Petitioners fail to explain, however, why that distinction should make any difference, particularly since the decision below sustaining Respondents' standing is not on appeal here. Clearly, Petitioners elevate form over substance.

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), a constitutional challenge to the "legislative veto," this Court rejected a similar attempt to elevate "private" constitutional rights over constitutional claims involving separation of powers issues:

> We must . . . reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests. . . . If the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled.

Id. at 935-36 (citation omitted). *See also Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty"); Madison, *The Federalist No.* 51 ("the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights").

Here, as in *Chadha*, if Respondents prevail on their argument that judicial review is necessary under the Act to implement the intent of Congress, and if they are able to enjoin the Shipyard's closure, their private interests will certainly be advanced. *Franklin's* constitutional challenge to the

Secretary's census allocation of overseas federal employees involved no more of a "private" constitutional right than the separation of powers challenge raised by Respondents here. To conclude that Congress intended to give the executive branch unlimited power to close military bases for whatever reason it deemed proper (or for no reason at all) would render the Act meaningless. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (" 'The cardinal principle of statutory construction is to save and not to destroy'. . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

3. *Franklin* Must Not Be Read To Eviscerate The Congressional Mandate Of Fair Process In The Closure Of Domestic Military Bases, Thereby Nullifying The Act.

Limited presidential involvement in a statutory scheme cannot give the imprimatur of legality to executive branch conduct brazenly violating congressional mandates. When Congress declared a statutory "purpose" – *i.e.*, to ensure a *"fair process"* – it certainly never intended for the executive branch to decide for itself whether the law should be obeyed. *See Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). The power of this argument is dramatically confirmed by Petitioners' astonishing failure to deal with it. Not even once in any of the 48 pages of their Brief do Petitioners acknowledge the declared "purpose" of the Act. They disingenuously ignore it – just as they boldly ignored the Congressional mandates designed to ensure the "fair process."

The fallacies in Petitioners' interpretation that there is no judicial review are illustrated by the following hypothetical. Assume that: (1) totally ignoring his statutory duty (§ 2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather based upon his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) despite knowledge of these violations and in violation of its own statutory duties (§ 2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider a joint resolution of disapproval within 45 days, and after only 2 hours of debate; and (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live – all *without* a fair process.

Petitioners' strained interpretation would preclude judicial review of even the most blatant, arbitrary and unlawful executive branch disregard of the procedures mandated by Congress to ensure a "fair process." That remarkably extreme argument cannot be squared with *Youngstown's* fundamental principle that the "Constitution is neither silent nor equivocal about who shall make the laws." As Justice Frankfurter cautioned in *Youngstown*:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

343 U.S. at 594 (Frankfurter, J., concurring).

C. Because The President Has No Authority To Accept A Base Closure Package Which Was The Product Of An Unfair Process, The Commission Report Is "Final" For The Purpose Of Judicial Review.

The Base Closure Act and the automatic reapportionment statute in *Franklin* do not share "similar statutory schemes." In *Franklin*, the act imposed no procedural requirements on the Secretary of Commerce and the Secretary's report to the President carried "no direct consequences" and had "no direct effect." 112 S. Ct. at 2774. Indeed, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner as to completely change the outcome of reapportionment. *Id.* (statute did not "require the President to use the data in the Secretary's report"). In fact, a Department of Commerce press release, issued the same day that the Secretary presented her report to the President, expressly confirmed that "the data presented to the President was still subject to correction." *Id.*

In stark contrast to the statute in *Franklin*, the Base Closure Act does not permit the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety and is not permitted to "cherry-pick" – *i.e.*, to add or eliminate individual bases.[22] As Petitioners concede:

> A critical feature of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard* the Commission's role in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, supra, at

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[22] The Act does not permit either the President or Congress to target any individual base or group of bases for closure. The list must be accepted or rejected by the President and Congress as presented. Thus, neither the President nor Congress could close a base not included on the Commission's indivisible base closure list.

> 704. The President may trigger base closures under the Act only by approving 'all the recommendations' of the *independent* Commission.

[Brief at 40 (emphasis added)]. The Act does not give the President either the time[23] or the resources to determine whether Petitioners complied with the Act's procedural mandates; indeed, that historically has been the function of the judiciary. *See Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and [defining] their jurisdiction").

The President must rely exclusively on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the mandated procedural safeguards that are the *raison d'etre* of the Act. *See, e.g., Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void"); Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 700 (1961) (supporting "decisions holding that the courts will determine whether the Commission has complied with the statutory requirements regarding notice and hearing and, finding such defects, will hold invalid a presidential proclamation based on such an investigation"). For the base closure process to function as Congress intended and for the President's decision to be informed and responsible, the Act's procedural mandates must be complied with at the *agency* level. The agencies' actions must therefore be "final" for the purpose of judicial review. *See Franklin*, 112 S. Ct. at 2773 ("core

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[23] *See* 10 U.S.C. § 2903(e) (President has only 15 days to review Commission's report).

question" regarding finality is whether "the agency has completed its decisionmaking process" and whether "the result of that process is one that will directly affect the parties").

Petitioners thus err in stating that the Act "makes the President *personally* responsible for base closure decisions, and provides for extensive congressional involvement and *oversight* in the process." [Brief at 15]. Petitioners themselves concede elsewhere in their Brief that Congress and the President intended to *avoid* responsibility for politically sensitive closure decisions by delegating their authority to target bases for closure to an independent commission. [Brief at 2-3]. The Secretary and the Commission alone are subject to the Act's procedural requirements and where those mandates have been ignored, the President is left without a legal package of base closures upon which to act. *See American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (if agency action was without statutory authority, "then as a legal reality there was nothing before the President"). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) (where the President cannot act without agency recommendation, "it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive was himself acting within his statutory authority.").

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J. concurring) ("It may be presumed that Congress does not intend administrative agencies,

agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands . . . "); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, to apply *Franklin* in the sweeping manner urged by Petitioners would eviscerate the two centuries of pre-*Franklin* precedent sustaining judicial review of agency action.

II. THE STRONG PRESUMPTION OF JUDICIAL REVIEW UNDER THE ACT HAS NOT BEEN REBUTTED BY "CLEAR AND CONVINCING EVIDENCE."

It is axiomatic that judicial review of final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). It is "presume[d] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen*, 476 U.S. at 681. This strong presumption in favor of judicial review can be overcome only upon a showing of "clear and convincing" evidence of a contrary congressional intent. *Id.* As emphasized in *Bowen:*

> We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' [citation omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 2 L Ed 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'
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> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the Administrative Procedure Act the Senate Committee on the Judiciary remarked:
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> 'Very *rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' [citation omitted].
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> The Committee on the Judiciary of the House of Representatives agreed that Congress *ordinarily intends that there be judicial review*, and emphasized the clarity with which a contrary intent must be expressed:
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> 'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' [citation omitted].

476 U.S. at 670-71 (emphasis added). *See also Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("[I]t is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue"). *Accord*, Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 403 (1958) ("there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon

executive power by the constitutions and legislatures"); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) ("statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases").

As Petitioners concede, the Act contains no express limitation on judicial review. That is itself evidence that Congress intended judicial review, since when Congress intends such a radical departure from tradition, it knows how to do so in plain language.[24] Indeed, as Petitioners themselves point out, in the *very statute at issue in this case*, Congress expressly limited procedurally-oriented challenges under NEPA, thereby conclusively demonstrating that it knew how to abrogate procedural challenges if it wanted to. *See* Brief at 43-44. Therefore, the complete absence of any language in the Base Closure Act expressly precluding judicial review must be deemed intentional, particularly in light of the express statutory purpose of ensuring a "fair process." *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 97-99 (1991).

In addition, as the Third Circuit held, neither the structure nor the legislative history of the Act contain evidence of congressional intent to abrogate judicial review. 971 F.2d at 949-50 ("we find no clear evidence of a congressional intent to preclude all judicial review other than limited NEPA review"). The presumption in favor of judicial review is of even greater force where, as here, it is alleged that the

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[24] *See, e.g.*, The Regulatory Flexibility Act of 1980, 5 U.S.C. § 611(a)-(b) (1982) (expressly precluding substantive and procedural judicial review of an agency's compliance with the Act); Export Regulations of the War and National Defense Act, 1979, Pub. L. No. 96-72, 50 U.S.C. § 2412 (expressly exempting certain actions taken under the Export Regulation subchapter of the War and National Defense Act from 5 U.S.C. §§ 551, 553-559 of the APA and from the APA's judicial review sections (5 U.S.C. §§ 701-706)). *See also* Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 791 (1958) ("The right to judicial review is too basic a protection. It is not too great a burden upon Congress to require it to speak to the issue.").

executive branch has exceeded the scope of delegated authority or has violated specific constitutional provisions. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence"); *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958). As set forth below, each of Petitioners' arguments to the contrary fail to rebut the strong presumption of judicial review.

A. National Security And Military Policy Concerns Do Not Abrogate Judicial Review.

Petitioners argue that the strong presumption in favor of judicial review is inapplicable to the closure of domestic military bases because such decisions involve "sensitive questions of national security and military policy." [Brief at 36-37]. They further contend that courts should not "intrude upon the authority of the executive in military and national affairs." However, the Act was expressly designed to provide a "fair process" for the closure of bases which severely impacted on regional economics and a significant number of *civilian*, not military, employees. 10 U.S.C. § 2687(a); § 2909(c).

Moreover, Congress considered issues of national security when it formulated the exclusive procedure under which domestic military bases are to be closed or realigned. The Act expressly *exempts* from its coverage the closure of a military base "if the President certifies to Congress that such closure . . . must be implemented for reasons of national security or military emergency." 10 U.S.C. § 2687(c). No such certification was made with respect to the Shipyard, which Petitioners concede has been slated for closure pursuant to the Act. Petitioners thus err in arguing that the "national security" concerns implicated by the closure of military installations should be construed to eliminate the strong presumption of

judicial review. *See also Vogelaar v. United States*, 665 F. Supp. 1295, 1303-04 (E.D. Mich. 1987).

Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518 (1988), is equally misplaced. *Egan* involved the Navy's refusal to grant a security clearance to a civilian employee working at a Trident nuclear submarine base. Concluding that the Navy's denial was not subject to review, the Court found that the "sensitive and inherently discretionary judgment call" that must be made on each request for a security clearance was "committed by law to the appropriate agency of the executive branch." In reaching that conclusion, the Court expressly noted that the President's broad discretion regarding access to information bearing on national security flowed from his constitutional powers as commander and chief and "exist[ed] quite apart from any explicit congressional grant." *Id.* at 527.

In contrast to *Egan*, Petitioners expressly disclaim any authority for their actions other than that granted to them by Congress under the Act. [Brief at 33]. Moreover, it is well established that the mere involvement of issues affecting the military does not immunize executive branch conduct from review. In fact, judicial review has been found particularly appropriate when, as here, "the actions of the military affect the domestic population during peacetime." *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

B. Judicial Review Is Consistent With The Timetables And Objectives Of The Act.

Petitioners suggest that "[b]y allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove [an indivisible] package of base closures, the Third Circuit has struck at the heart of the carefully balanced statutory mechanism enacted by Congress." As support for that position, they refer to the Act's "rigid series of deadlines and time limits" without a single reference to the Act's "fair process" mandate. [Brief at 42]. That argument, however, contains the seed of its own destruction, for without judicial review the executive branch could

simply ignore the Act's procedural timetable, just as it here ignored the Act's procedural "fair process."

Could the Secretary attempt to initiate a base closure round in 1994 – a year not provided for in the statute? Could the President attempt to submit a base closure package to Congress thirty days (instead of 15 days) after he received it from the Commission, and then direct his Secretary of Defense to begin closing military bases after Congress was unable to muster the votes for a resolution of disapproval? Could Congress disapprove a closure package 90 days (instead of 45 days) after its receipt from the President? Would any base closure package tainted by such procedural defects properly be enjoined by a federal court?[25] Taking Petitioners' fundamental argument to its logical conclusion, the answer to all of the foregoing questions would be a clear "*No*."

Petitioners' argument flies in the face of the paramount fact that the declared *purpose* of the Act is to ensure the *procedural integrity* of the base closure process. Understanding "the importance of public confidence in the integrity of the decision making process," Congress mandated a number of critical procedural safeguards, not one of which had appeared in prior legislation. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) (Congress designed the procedural safeguards of the 1990 Act to allay continuing "suspicions about the integrity of the base closure selection process").

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[25] Petitioners' own Brief concedes that: (1) the Secretary: a) "*must* submit a six-year force structure plan", b) "*must* establish . . . selection criteria for base closure recommendations" and c) "*must* prepare base closure recommendations"; (2) the Commission: a) "is *charged* with" holding public hearings, b) preparing a single package of recommendations and c) "*must*" forward a single indivisible package of base closures to the President by July 1; (3) the President "*must*" approve or disapprove the entire package within 15 days; and (4) Congress *must* disapprove the entire package – if at all – within 45 days. [*See, e.g.*, Brief at 5-6, 16]. *See* § 2904(b) (Secretary may not carry out any closure or realignment if Congress enacts joint resolution disapproving Commission's base closure package within 45 days of receipt from President).

The express purpose of these safeguards was to ensure that the Commission, the President and Congress each received "balanced and informed advice" in the course of their statutory duties. Considering the genesis, purpose and nature of this procedurally-oriented statute, if quick closures were the only goal, the 1990 Act would have been totally unnecessary. Indeed, as recognized by the Third Circuit, there is:

> little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decision-making process and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time consuming; bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental action involving far greater exigency.

971 F.2d at 948 (citations omitted).

C. Limited And Ambiguous References In The Legislative History To The Scope Of APA Review Do Not Reflect Congressional Intent To Preclude Judicial Review.

Petitioners further suggest that the Act's legislative history reflects a congressional intent to preclude review. That argument, however, rests on a strained misreading of an ambiguous excerpt from the Act's Conference Report and does not constitute "clear and convincing" evidence of an intent to deny judicial review.[26] The Conference Report states:

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[26] To begin with, one never gets to the legislative history to destroy the expressed *purpose* of an unambiguous statute. *See Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (clarity of statutory language obviates need for inquiry into legislative history); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("best evidence" of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President").

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) contain explicit exemptions for 'the conduct of military or foreign affairs functions.' An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the Administrative Procedure Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), the decision of the President under section 2803(e), and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("H.R. Conf. Rep. 101-923").

Even if it were appropriate to review this legislative history, given the clear and unambiguous expression of Congressional intent in the Act's "fair process" mandate, the Conference Report reflects, at most, that in carrying out their

statutory duties under the Act, the Secretary of Defense and the Commission were to be exempt from the rulemaking and adjudication provisions of *Chapter 5* of the APA (5 U.S.C. §§ 553, 554, 556 and 557). This limitation, however, is entirely separate and distinct from the review sought here under *Chapter 7* of the APA.[27] A broad right to judicial review of agency action is provided by Chapter 7 to determine, *inter alia*, whether Petitioners' actions were "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).[28]

Moreover, the quote from the Conference Report does not reflect congressional intent to preclude judicial review of the *integrity* of the process. The Report's list of "[s]pecific

[27] Chapter 5 of the APA, which establishes procedures for agency rulemaking and adjudication (5 U.S.C. §§ 553 and 554), is entirely separate and distinct from Chapter 7 of the APA, which grants a broad right to judicial review of agency action by aggrieved persons (5 U.S.C. §§ 701 *et seq.*), and does not contain equivalent limitations. Petitioners disregard the fact that agency action may be exempt from the APA's special procedural requirements for agency rulemaking (§ 553) and agency adjudication (§§ 553 and 554) on any of several independent grounds, but nonetheless remain subject to the entire spectrum of judicial review under Chapter 7, *e.g.*, to determine whether agency action was "without observance of procedure required by law," or was "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2). *See, e.g., Common Cause v. Dept. of Energy*, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983).

[28] One important illustration of the distinction between these two sets of provisions is that, as set forth in Petitioners' Brief, the rulemaking and adjudication provisions contained in Chapter 5 of the APA expressly do *not* apply to "the conduct of military or foreign affairs functions." 5 U.S.C. §§ 553 and 554. However, the right to judicial review found in Chapter 7 is *not* subject to this exception, but rather has its own exceptions, which apply only to Chapter 7 of the APA. Accordingly, a particular agency action may be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function, but nevertheless be subject to judicial review under section 702 of the APA for adherence to constitutional, statutory and procedural requirements. *See, e.g., International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy*, 915 F.2d 727 (D.C. Cir. 1990).

actions which would not be subject to judicial review" *omits the actions of the Commission* itself in preparing the base closure package. That omission is highly relevant since the Commission has the dominant role in the base closure process. Plainly, that omission was not an oversight, and demonstrates that the actions of the Commission itself were intended to be subject to judicial review for compliance with the Act's mandatory procedures. Thus, the legislative history on which Petitioners so heavily rely does *not* provide "clear and convincing evidence" necessary to abrogate the Act's unambiguously declared purpose to ensure a "fair process" and, at the very least, leaves "substantial doubt" that Congress intended to preclude all judicial review. Thus, the "general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

D. The Act's Limitation On Review Of NEPA Claims Is Not Evidence Of Congressional Intent To Abrogate Judicial Review Of The Claims In This Case.

Petitioners contend that the Act's express limitations on review under NEPA (the National Environmental Policy Act of 1969), reflect a congressional intent to preclude all other forms of judicial review.[29] [Brief at 43-44]. That argument was decisively rejected by the Third Circuit:

[29] NEPA is a "disclosure" statute requiring federal agencies to include an Environmental Impact Statement "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Congress recognized that NEPA litigation had been used "to delay and ultimately frustrate base closure." H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) at 23. The Act therefore only requires the Department of Defense to comply with NEPA's disclosure mandates "during the process of relocating functions from a military installation being closed or realigned to another military installation . . . " 10 U.S.C. § 2905(c)(2)(A). The Act limits NEPA review by requiring that any action to enforce the statute's disclosure requirements be brought within 60 days of the alleged violation. 10 U.S.C. § 2905(c)(3). Thus, without eliminating

Defendants point out that NEPA claims have been used to delay earlier base closures; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, '[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute.' *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977).

> In short, we conclude that § 2905(c) does not constitute clear evidence of congressional intent with respect to all judicial review under the Act.

971 F.2d at 948. *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent") (quoting Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 771 (1958)).

The foregoing conclusion is consistent with the maxim of statutory construction: *unius est exclusio alterius*, which dictates that a specific statutory exclusion should be construed to exclude *only* that which is specifically excluded. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("enactment of a provision defining the preemptive reach of a

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NEPA's important goals, Congress simply limited NEPA challenges to a 60-day window.

statute implies that matters beyond that reach are not preempted"). Because Congress expressly limited only *one* specific form of procedural challenge to the base closure process, it should be presumed that Congress (with knowledge of this Court's holdings that judicial review is presumed unless there is clear and convincing evidence to the contrary) did *not* intend to prohibit other forms of review – particularly the review of claims concerning the procedural fairness and integrity of the base closure process itself.

E. By Joint Resolution Congress Confirmed That The Legislative Veto Provision Was Not Intended As A Substitute For Judicial Review.

Petitioners suggest that evidence of congressional intent to eliminate all judicial review may be discerned from the Act's "legislative veto" provision and stretch even further and claim that the integrity of the Act "quite explicitly relies on oversight by Congress to see that the law is observed." [Brief at 48]. This argument is totally contradicted by the structure and declared purpose of the Act. Congress not only has a maximum of only 45 days to pass a joint resolution disapproving the base closure package in its entirety, but any debate on such resolution is limited to a scant *two hours*, to be "divided equally between those favoring and those opposing the resolution." § 2687(d)(2). This is hardly clear and convincing evidence that Congress intended to assume responsibility for assuring the procedural integrity of the base closure process.[30]

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[30] Indeed, accepting *arguendo* Petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. for Cert. at 5), the President would have veto power to decide base closures. Such a veto would be virtually impossible to override in the limited time and circumstances provided for Congress to act. If Congress had intended to give the President unilateral authority to close bases, the Base Closure Act would have been unnecessary.

Even if there were any lingering doubt on the issue, Congress in fact passed a joint resolution expressly confirming that its legislative veto power was *not* intended to supplant judicial review of "fair process":

> It is the sense of . . . [Congress] that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendations, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the Resolution of Disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base [Closure] and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

S. Res. 1216, 102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781-13811. *See also Kennedy for President Committee v. Federal Election Comm.*, 734 F.2d 1558, 1563 n.7 (D.C. Cir. 1984) ("we do not believe that the simple existence of a legislative veto provision should immunize an agency from challenges that its action oversteps its statutory authority"). Accordingly, judicial review of the procedural integrity of the base closure process manifestly remains the province of the federal judiciary.[31]

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[31] Petitioners also attempt to insulate their conduct from judicial review by arguing that there is no adequate remedy for their egregious misconduct. However, the Shipyard could simply be removed from the 1991 closure list.

III. THE BASE CLOSURE ACT WOULD BE UNCONSTITUTIONAL IF READ TO PRECLUDE ALL FORMS OF JUDICIAL REVIEW.

If the Act were construed to abrogate all forms of judicial review, including constitutional claims, two constitutional questions would arise: (1) would the Act unconstitutionally delegate legislative power to the executive branch? and (2) would the Act unconstitutionally abrogate the power of the federal judiciary to review constitutional claims? *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974) ("We . . . reaffirm that it is the province and duty of this Court 'to say what the law is'. . . . "). To avoid both questions, this Court should affirm the decision below. *See Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2283 (1993) ("if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). This Court's reluctance to address constitutional issues unnecessarily is particularly acute where, as here, those issues "concern the relative powers of coordinate branches of government." *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

A. Without Judicial Review, The Act Would Unconstitutionally Delegate Legislative Power To The Executive Branch.

The doctrine prohibiting Congress from delegating its legislative power "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The

Court has "long . . . insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another branch." *Id.* at 371-72 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)). As Justice Scalia noted in his dissent in *Mistretta*:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

488 U.S. at 415 (Scalia, J., dissenting). As the Court held in the context of a challenge to wartime economic regulation, delegation of legislative power is:

> constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*

American Power & Light Co. v. Securities and Exchange Comm., 329 U.S. 90, 105 (1946) (emphasis added).

Although the doctrine of unconstitutional delegation necessarily is balanced against a recognition that Congress must have the resources and flexibility to perform its legislative function, *see, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), Congressional delegation of power is still subject to careful scrutiny. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). The delegation doctrine "ensur[es] that courts charged with reviewing the exercise of legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union*, 448 U.S. at 686. *See also*

Touby v. United States, 111 S. Ct. 1752, 1758 (1991) (Marshall, J., concurring) ("judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds"). Delegation of legislative power will survive constitutional scrutiny only "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.' " *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Yakus v. United States*, 321 U.S. 414 (1944)). Thus, judicial review is a critical component of a valid statutory delegation.

As in *American Power & Light*, 329 U.S. at 105, the fate of domestic military bases presents substantial and basic issues of public policy. In the Act, Congress has delegated a great portion of its authority to make base closure decisions to the executive branch (*i.e.*, the Secretary of Defense and the Commission), but *subject* to stringent procedural mandates. A serious constitutional question would therefore arise if the courts were stripped of their historic jurisdiction to review whether the Secretary and the Commission have each complied with the will of Congress by following the mandated procedures. To avoid this constitutional issue, the Act should be read to permit judicial review. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 367 (1974) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided").

B. Judicial Review Of Constitutional Claims Cannot Be Abrogated.

As concluded below, the question of "whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review." 995 F.2d at 409. Petitioners nonetheless argue that Congress did not intend for there to be judicial review under the Act, even of constitutional issues. However, imparting such broad intent to Congress would raise a serious constitutional issue because

Congress has not and could not place executive branch conduct beyond constitutional scrutiny. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

In *Webster*, a discharged CIA employee brought both APA and constitutional claims against the Agency's Director. In light of the Director's broad statutory authority with respect to employment decisions, the court held the Director's decision to discharge plaintiff was not subject to APA review. Despite significant national security concerns, however, the *Webster* Court concluded that the Act did not – and possibly could not – be construed to preclude review of the former employee's constitutional claims:

> In [CIA's] view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robinson*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid *'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.*

486 U.S. at 603 (emphasis added) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). At a minimum, the issue whether or not the Secretary, the Commission and the President have transgressed the limits of their statutory authority presents a "colorable constitutional claim." As with the issue of unconstitutional delegation, this issue can be avoided by determining that the Act permits review of Respondents' constitutional claims. *See, e.g., A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) (construing statute to authorize judicial

review to avoid constitutional issue raised if statute were construed to prohibit review).[32]

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[32] An association known as "Business Executives for National Security" ("BENS") – two members of which were members of the 1991 base closure commission and defendants in this case – has filed an *amicus* brief supporting reversal of the decision below. Arguing backwards, BENS suggests that congressional intent to eliminate all judicial review under the Act can be discerned from the fact that, as a matter of recent experience, conversion of military installations to civilian use is easier without the threat of judicial intervention and the attendant delays of litigation. Of course, most executive branch decisions could be implemented more simply and more expeditiously without the specter of judicial review. Such a bold statement of bureaucratic absolutism, however, has no place in our constitutional order. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of authority or under an authority not validly conferred"). If expedition had been Congress' only goal in passing the Act, there would have been no need to pass it. The plain language of the Act itself memorializes Congress' goal of ensuring that a "fair process" is employed in closing bases.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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